



D4

U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 02 045 53391 Office: Vermont Service Center

Date: JAN 19 2003

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(b)

IN BEHALF OF PETITIONER: Self-represented

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner desires to extend its authorization to employ the beneficiary as a nanny and housekeeper for one year. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the evidence submitted did not establish that the petitioner's need for the beneficiary's services is temporary.

On appeal, the petitioner states that he needs his sister to help him take care of his family for another year due to his son's medical disability. Further, the petitioner states that his wife has not changed to a part-time job which would enable her time to watch the children.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

an alien...having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), codified in current regulations at 8 C.F.R. 214.2(h)(6)(ii), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. See 55 Fed. Reg. 2616 (1990).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. 214.2(h)(6)(ii)(B).

The petition indicates that the employment is a one-time occurrence and that the temporary need is periodic.

The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(1) states that for the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

1. Walk children to school.
2. Clean the house and prepare the dinner.
3. Walk children from school.
4. Take care of children.
5. Serve dinner.
6. Wash dishes and clean after dinner.

The petitioner states that the extension is necessary because his son is developmentally disabled and his wife is unable to change to a part-time job and watch the children before and after school. The petitioner states that he is sure that by the end of 2002, his family situation will be settled. However, the petitioner has not submitted evidence regarding his son's medical condition, or evidence of secured part-time employment for his spouse to establish that they will not need a worker to perform these services in the future. The duties have been shown to be ongoing as the beneficiary has been in H classification from February 18, 2001 until December 31, 2001. Therefore, the petitioner has not established that the nature of its need for a nanny and housekeeper is temporary in nature.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.